TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 12

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MORGAN'S, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1934
CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

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1 Before United States Board of Tax Appeals

Docket No. 46639

MORGAN'S, INCORPORATED (PARENT), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For petitioner: J. M. Pullman, Esq. (withdrawn), Lawrence E. Green, Esq.
For respondent: C. C. Holmes, Esq.

Docket entries

1929
Dec. 17—Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 18—Copy of petition served on general counsel.
1930
Jan. 23—Answer filed by general counsel.
Jan. 25—Copy served on taxpayer—General calendar.
Jan. 24—Amended petition filed by taxpayer.
2 Jan. 27—Copy of amended petition served on general counsel.
Jan. 29—Answer filed by general counsel. Copy served 1/30/30.
1932
Jan. 27—Hearing set March 2, 1932.
Feb. 4—Motion to place on the Boston, Mass., circuit calendar filed by taxpayer. 2/5/32 granted.
June 17—Notice of hearing at Boston, Mass., beginning July 25, 1932.
July 25—Hearing had before Charles P. Smith, division 5, on merits. Submitted. Consolidated with 46640. Stipulation of facts filed. Briefs due in 45 days.
Aug. 6—Transcript of hearing July 25, 1932 filed.
Sept. 3—Brief filed by taxpayer.
Nov. 5—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered for respondent.
Nov. 7—Decision entered—Division 5, Charles P. Smith.
Nov. 30—Praecipe for appearance of Lawrence E. Green as counsel for petitioner filed.
1933
Jan. 3—Motion to revise memorandum opinion filed by taxpayer.
Jan. 4—Order revising memorandum opinion entered.
Jan. 13—Notice of withdrawal of J. M. Pullman and request to send all notices to L. E. Green filed by Mr. Pullman.
Jan. 14—Petition for review to U.S. Circuit Court of Appeals (1) with assignments of error filed by taxpayer.
Jan. 17—Proof of service filed.
Feb. 27—Stipulation to consolidate with docket 46640 for single transcript of record filed.
Mar. 3—Praecipe with proof of service thereon filed by taxpayer.
Mar. 6—Copy or order from 1st Circuit consolidating with 46640 as a single case filed.

1933
Mar. 6—Copy of order from 1st Circuit enlarging time to April 1, 1933 for filing record filed.
Mar. 30—Order enlarging time for transmission of record to April 22, 1933, entered.

3 Before United States Board of Tax Appeals

Docket No. 46640

HAINES FURNITURE CO. (SUBSIDIARY), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For Petitioner: J. M. Pullman, Esq. (withdrawn), Lawrence E. Green, Esq.
For respondent: C. C. Holmes, Esq.

Docket entries

See docket 46639.
1929
Dec. 17—Petition received and filed. Taxpayer notified. (Fee not paid.)
1930
Jan. 15—Order to show cause by 2/5/30 entered (fee case).
Jan. 24—Fee paid (check). Amended petition filed by taxpayer.
Jan. 27—Copy of amended petition served on general counsel.
Jan. 27—Copy of petition served on general counsel.
Feb. 24—Answer to amended petition filed by general counsel.
Mar. 8—Copy served on taxpayer—General calendar.
1932
Jan. 27—Hearing set Mar. 2, 1932.
Feb. 4—Motion to place on the Boston, Mass., circuit calendar filed by taxpayer. 2/5/32 granted.
June 17—Notice of hearing at Boston, Mass., beginning July 25, 1932.
July 25—Hearing had before Mr. C. P. Smith, division 5, on merits. Submitted. Consolidated with 46639. Stipulation of facts filed. Briefs due 45 days.
Aug. 6—Transcript of hearing of July 25, 1932, filed.
Sept. 3—Brief filed by taxpayer.
Nov. 5—Memorandum opinion rendered—Charles P. Smith, division 5. Judgment will be entered for respondent.
4 Nov. 7—Decision entered, division 5, Charles P. Smith.
Nov. 30—Praecipe for appearance of Lawrence E. Green as counsel for petitioner filed.
1933
Jan. 3—Motion to revise memorandum opinion filed by taxpayer.
Jan. 4—Order revising memorandum opinion entered.
Jan. 13—Notice of withdrawal of J. M. Pullman and request to send all notices to L. E. Green filed by Mr. Pullman.

1933
Jan. 14—Petition for review to U.S. Circuit Court of Appeals (1) with assignments of error filed by taxpayer.
Jan. 17—Proof of service filed.
Feb. 13—Stipulation to consolidate with docket 46639 for single transcript of record filed.
Mar. 3—Praecipe with proof of service thereon filed by taxpayer.
Mar. 6—Copy of order from 1st Circuit consolidating with docket 46639 filed.
Mar. 6—Copy of order from 1st Circuit enlarging time to April 1, 1933, for filing record filed.
Mar. 30—Order enlarging time for transmission and delivery of record to April 22, 1933, entered.

5 Before U.S. Board of Tax Appeals

[No. 46639. Title omitted]

Amended petition

Filed January 24, 1930

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue, as set forth in his deficiency letter IT:AR:D:CAM–60D, dated October 25, 1929, and as a basis of its appeal sets forth the following:

1. The petitioner is a Massachusetts corporation, with a principal office in Boston, Massachusetts.

2. The deficiency letter (copy of which is annexed hereto) was mailed to the petitioner on October 25, 1929.

3. The taxes in controversy are income taxes for the year 1927, and are less than $10,000, to wit, $1,434.22.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:

"1. Said determination of tax represents a portion of a deficiency asserted against one of the subsidiaries of the above-named petitioner, and has been erroneously asserted against said petitioner, for said petitioner is not a transferee of said subsidiary.

"2. The basis for said determination of tax both against said petitioner and its said subsidiary is erroneous, for the Commissioner erred in disallowing a deduction from the gross income of said subsidiary, namely, Haines Furniture Company, for the year 1927 (which gross income was included in a consolidated income-tax return filed by said petitioner) an amount of $59,239.56, representing a statutory net loss sustained by said Haines Furniture Company for the period from January 1, 1925, to May 31, 1925, both dates inclusive."

5. The facts upon which said petitioner relies as a basis of its appeal are as follows:

"1. As at June 1, 1925, said petitioner acquired the entire voting capital stock of said Haines Furniture Company.

"2. Said Haines Furniture Company, which maintains books of account on a calendar year basis, sustained a net loss
6 from operations for each of the calendar years 1925 and 1926, but derived a taxable net income of $63,188.34 (exclusive of deduction for statutory net loss for the period from January 1, 1925, to May 31, 1925) for the calendar year 1927.

"3. In accordance with regulations promulgated by said respondent, said Haines Furniture Company filed a separate income-tax return for the period from January 1, 1925, to May 31, 1925, which disclosed a statutory net loss in the amount of $59,239.56.

"4. In computing its taxable net income for the calendar year 1927, said Haines Furniture Company deducted said statutory net loss of $59,239.56 for the period from January 1, 1925, to May 31, 1925, in accordance with the provisions of Section 204 of the Revenue Act of 1926."

Wherefore, said petitioner respectfully prays that this Board may hear and determine its appeal.

ABNER COHAN,
President Morgan's, Incorporated,
757 Washington Street, Boston, Massachusetts.

[*Duly sworn to by Abner Cohan; jurat omitted in printing.*]

7 TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Oct. 25, 1929.

Address reply to Commissioner of Internal Revenue and refer to Morgan's, Incorporated, 757 Washington Street, Boston, Massachusetts.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1927 discloses a deficiency of $1,434.22, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is

made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBERT H. LUCAS,
Commissioner.
By DAVID BURNET,
Deputy Commissioner.

Inclosures: Statement form 866–C. R. Form 882. Schedules 1, 2, and 3.

8 IT:AR:D CAM:60D

Statement of Returns Examined and Resulting Tax Liability

RETURNS EXAMINED

Parent	Years	Forms
Morgan's, Incorporated, Boston, Massachusetts	1927	1120
Subsidiary companies:		
Haines Furniture Company, Boston, Massachusetts	1927	None
Stuart Investment Trust, Incorporated, Boston, Massachusetts	1927	None

CONSOLIDATED TAX LIABILITY

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$27,138.94	$19,141.60	$7,997.34

The adjustments producing the above-stated result are the same as shown in Bureau letter dated July 27, 1929, and are shown in the attached schedules 1, 2, and 3.

The consolidated tax assessed and corrected tax liability have been allocated to the various companies on the basis of the net income properly assignable to each as provided in section 240 of the Revenue Act of 1926.

ALLOCATION

Companies	Original		Corrected		
	Income	Tax	Income	Tax	Deficiency
Morgan's, Incorporated	$182,932.12	$18,737.14	$182,932.12	$20,171.36	$1,434.22
Haines Furniture Company	3,948.78	404.46	63,188.34	6,967.58	6,563.12
Total	186,880.90	19,141.60	246,120.46	27,138.94	7,997.34

9 SCHEDULE 1—NET INCOME HAINES FURNITURE COMPANY

Net income as disclosed by return	$3,948.78
As corrected	63,188.34
Net adjustment	59,239.56

Unallowable deductions and additional income:

(a) Net loss period January 1 to March 31, 1925, $59,239.56.

The Bureau holds inasmuch as the affiliated group subsequent to May 31, 1925, is not composed of the same corporations as made up the consolidation prior thereto, that the net loss sustained before that date cannot be applied under section 206 against the net income accrued subsequent to such date.

SCHEDULE 2—CONSOLIDATED NET INCOME, 1927

Net income as corrected:		
Haines Furniture Company (schedule 1)	$63,188.34	
Morgan's, Incorporated (reported)	182,932.12	
Total		$246,120.46
Net losses as reported:		
Stuart Investment Trust, Incorporated		45,091.27
Consolidated net income for tax purposes		201,029.19

SCHEDULE 3—COMPUTATION OF TAX, 1927 INCOME TAX

Net income for taxable year (schedule 2)		$201,029.19
Less: Net loss (section 206, acts of 1924 and 1926)		None.
Balance subject to tax		201,029.19
Income tax at 13½ percent	$27,138.94	
Tax previously assessed	19,141.60	
Additional tax to be assessed	7,997.34	

10 Before United States Board of Tax Appeals

[No. 46639. Title omitted.]

Answer to amended petition

Filed January 29, 1930

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3.

4. Denies the respondent erred in the manner alleged and set forth in paragraphs 4 (a) and 4 (b).

5 (1). Admits the allegations in paragraph 5 (1).

5 (2). Denies the allegations in paragraph 5 (2).

5 (3). Admits the allegations in paragraph 5 (3).

5 (4). Denies the allegations in paragraph 5 (4).

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Docket 46640.

[(Title omitted.)]

Amended petition

Filed January 24, 1930

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue, as set forth in his deficiency letter IT:AR:D:CAM–60D, dated October 25, 1929, and as a basis of its appeal sets forth the following:

1. The petitioner is a Massachusetts corporation, with a principal office at Boston, Massachusetts.

2. The deficiency letter (copy of which is annexed hereto) was mailed to the petitioner on October 25, 1929.

11 3. The taxes in controversy are income taxes for the year 1927, and are less than $10,000, to wit, $6,563.12.

4. The determination of tax contained in the said deficiency letter is based upon the following error:

"1. The Commissioner erred in disallowing as a deduction from the gross income of the petitioner for the year 1927 (included in a consolidated income tax return for that year filed by Morgan's, Incorporated, of which the petitioner is a subsidiary) an amount of $59,239.56, representing a statutory net loss sustained by the petitioner for the period from January 1, 1925, to May 31, 1925, both dates inclusive."

5. The facts upon which said petitioner relies as a basis of its appeal are as follows:

"1. As at June 1, 1925, said Morgan's, Incorporated, acquired the entire voting capital stock of said petitioner.

"2. Said petitioner maintains books of account on a calendar year basis. It sustained a net loss from operations for each of the calendar years 1925 and 1926, but derived a taxable net income of $63,188.34 (exclusive of deduction for statutory net loss for the period from January 1, 1925, to May 31, 1925) for the calendar year 1927.

"3. In accordance with regulations promulgated by said respondent, said petitioner filed a separate income tax return for the period from January 1, 1925, to May 31, 1925, which disclosed a statutory net loss in the amount of $59,239.56.

"4. In computing its taxable net income for the calendar year 1927, said petitioner deducted said statutory net loss of $59,239.56 for the period from January 1, 1925, to May 31, 1925, in accordance with the provisions of section 204 of the Revenue Act of 1926."

Wherefore, said petitioner respectfully prays that this Board may hear and determine its appeal.

SIDNEY B. ROGAL,
Treasurer, Haines Furniture Company,
728 Washington Street, Boston, Massachusetts.

12 [*Duly sworn to by Sidney B. Rogal; jurat omitted in printing.*]

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, October 25, 1929.

Address reply to Commissioner of Internal Revenue and refer to Haines Furniture Company, 757 Washington Street, Boston, Massachusetts.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1927 discloses a deficiency of $6,563.12, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to join in executing the consolidated form 866 enclosed in a separate communication of even date addressed to Morgan's, Incorporated, Boston, Massachusetts. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of

13 interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner.

By ——— ———,
Deputy Commissioner.

Enclosures; Statement form 882

IT:AR:D CAM-60D

Statement of Tax Liability

Company	Years	Deficiency in tax
Haines Furniture Company, Boston, Massachusetts	1927	$6,563.12

The adjustments producing the above-stated results are shown in schedules attached to a letter addressed to Morgan's, Incorporated, Boston, Massachusetts.

Before United States Board of Tax Appeals

[Docket No. 46640. Title omitted]

Answer to amended petition

Filed February 24, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the amended petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations in paragraphs 1, 2, and 3.

4. Denies the respondent erred in the manner alleged and set forth in paragraph 4.

5 (1) Admits the allegations in paragraph 5 (1).

5 (2) to 5 (4). Denies the allegations in paragraphs 5 (2) to 5 (4).

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

14 Before United States Board of Tax Appeals

Docket Nos. 46639, 46640

MORGAN'S, INCORPORATED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HAINES FURNITURE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

J. M. Pullman, Esq., for the petitioners.
C. C. Holmes, Esq., for the respondent.

Memorandum opinion

Entered November 5, 1932

SMITH: These proceedings consolidated for hearing are for the redetermination of deficiencies in income tax for 1927 of $1,434.22

in the case of Morgan's, Inc., docket no. 46639, and of $6,563.12 in the case of Haines Furniture Company, docket no. 46640.

The petitioners are Massachusetts corporations organized prior to 1925. They each maintain their books on a calendar year basis. They were affiliated from June 1, 1925, to the end of the year 1927.

As of June 1, 1925, Morgan's Inc., acquired the entire voting stock of the Haines Furniture Company. Morgan's, Inc., had a net income for the calendar year 1925 of $203,527.24, for the calendar year 1926 of $142,900.94, and for the calendar year 1927 of $182,932.12.

The Haines Furniture Company sustained a net loss for the period January 1, 1925, to May 31, 1925, of $59,239.56; a net loss for the period June 1, 1925, to December 31, 1925, of $61,626.69; a net loss for the calendar year 1926 of $2,551.76; and a net profit for the calendar year 1927 of $63,188.34.

For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Inc., and Haines Furniture Company, which included the net profit of the former for the entire calendar year and the net loss of the latter for the entire calendar year.

15 For the year 1925, the Haines Furniture Company, in accordance with the regulations of the Commissioner, filed on March 14, 1928, a separate return for the period January 1 to May 31, 1925, which disclosed a net loss of $59,239.56; its net loss for the balance of the calendar year 1925 of $61,626.69 was included in the consolidated corporation income-tax return filed by Haines Furniture Company and Morgan's, Inc., for the calendar year 1925. For the year 1926, the net loss of the Haines Furniture Company of $2,551.76 was included in the consolidated corporation income-tax return filed by Haines Furniture Company and Morgan's, Inc. In the consolidated corporation income-tax return filed by the same companies for the calendar year 1927, the income of Haines Furniture Company of $63,188.34 was reduced by the net loss sustained by that company for the period January 1 to May 31, 1925, of $59,239.56.

No part of the net loss sustained by the Haines Furniture Company for the fractional part of the year 1925, prior to affiliation with Morgan's, Inc., has been allowed in computing the consolidated net income for the taxable period June 1 to December 31, 1925, or for the calendar years 1926 and 1927.

The deficiency determined against each petitioner for the year 1927 represents the allocation to it of the deficiency claimed to be due on the basis of net income properly assignable to each corporation as provided in section 240 of the Revenue Act of 1926.

As will appear from the foregoing, the only point in issue here is whether the Haines Furniture Company is entitled to carry forward a net loss sustained for the period January 1 to May 31, 1925, and deduct the same from net income of the Haines Furniture Company for the calendar year 1927, the company not having the benefit of

the deduction of any portion of the net loss for such period during the balance of the year 1925 or of the year 1926, it having sustained net losses in both periods. The respondent contends that the net loss may not be carried forward beyond the calendar year 1926, his contention being predicated upon the definition of the term "taxable year", as contained in section 200 of the Revenue Act of 1926.

16 The principle applicable here has been decided contraryo the petitioner's contentions in Weissberger Moving & Storage Co., Inc., 26 B.T.A. —; The Joseph & Feiss Co., 26 B.T.A. —; and Arnold Constable Corporation, 26 B.T.A. —.

Judgments will be entered for the respondent.

Before United States Board of Tax Appeals, Washington

Docket nos. 46639, 46640

[Titles omitted.]

Order correcting memorandum opinion

Entered January 4, 1933

The petitioners in the above-entitled proceedings having, on January 3, 1933, filed a motion for the correction of the memorandum opinion of the board entered November 5, 1932, and counsel for the respondent having stated that he has no objection to the granting of such motion, it is—

Ordered that the paragraph on page 2 of the memorandum opinion reading as follows:

"For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Incorporated, and Haines Furniture Company, which included the net profit of the former for the entire calendar year and the net loss of the latter for the entire calendar year."

be deleted, and that there be substituted therefor the following:

"For the calendar year 1925, a consolidated corporation income-tax return was filed by Morgan's, Incorporated, and Haines Furniture Company, which included the net income of the former for the entire calendar year and the net loss of the latter for the balance of

17 the calendar year 1925, namely, from June 1, 1925, to December 31, 1925 (the net loss of the latter from January 1, 1925, to May 31, 1925, amounting to $59,239.66 was also claimed as a deduction but was disallowed)."

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals, Washington

Docket no. 46639

MORGAN'S, INCORPORATED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

[Entered November 7, 1932]

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered November 5, 1932, it is ordered and decided: That there is a deficiency of $1,434.22 for the year 1927.

CHARLES P. SMITH, *Member.*

Before United States Board of Tax Appeals, Washington
Docket no. 46640

HAINES FURNITURE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

[Entered November 7, 1932]

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered November 5, 1932, it is ordered and decided: That there is a deficiency of $6,563.12 for the year 1927.

CHARLES P. SMITH, *Member.*

18 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket no. 46639

[Title omitted.]

Petition for review and assignments of error

Filed January 14, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Morgan's, Incorporated, the petitioner in this cause, by Lawrence E. Green, attorney, and hereby files its petition for a

review by the United States Circuit Court of Appeals for the First Circuit of a decision by the United States Board of Tax Appeals rendered on November 7, 1932, determining a deficiency in the petitioner's Federal income tax for the calendar year 1927 in the amount of $1,434.22 and respectfully shows:

I. The petitioner is a Masachusetts corporation with its principal office in Boston, Massachusetts.

A consolidated corporation income tax return was filed by the petitioner and Haines Furniture Company for the calendar year 1927 with the Collector of Internal Revenue for the District of Massachusetts which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

The court in which the review of these proceedings is sought is the United States Circuit Court of Appeals for the First Circuit.

II. The nature of the controversy is as follows:

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1927.

Prior to 1925 the petitioner and Haines Furniture Company were separate Massachusetts corporations. They each at all material
19 times maintained their books and filed income tax returns on a calendar year basis. On June 1, 1925, the petitioner acquired the entire voting stock of Haines Furniture Company.

For the year 1925 Haines Furniture Company, in accordance with the regulations of the Commissioner of Internal Revenue, filed a separate income tax return for the period January 1, 1925, to May 31, 1925, which disclosed a net loss of $59,239.56 which had been sustained by that company in that period. The Haines Furniture Company had a net loss for the balance of the calendar year 1925 of $61,626.69, which was included (together with the petitioner's net income of $203,527.24 for the calendar year 1925) in a consolidated corporation income tax return which was filed by the petitioner and Haines Furniture Company for the calendar year 1925.

For the calendar year 1926 a consolidated corporation income tax return was filed in accordance with said regulations, which included the petitioner's net income of $142,900.94 and Haines Furniture Company's net loss of $2,551.76 for that year.

For the calendar year 1927 the petitioner had a net income of $182,932.12 and Haines Furniture Company a net income of $63,188.34. In accordance with said regulations a consolidated corporation income tax return was filed by both of said corporations for the calendar year 1927. In that return as filed the net income of Haines Furniture Company, amounting to $63,188.34, was reduced to $59,239.56, the amount of the net loss sustained by Haines Furniture Company for the period from January 1, 1925 to May 31, 1925. The Haines Furniture Company had had net losses for the period June 1, 1925, to December 31, 1925, and for the calendar year 1926; and consequently no deduction was claimed or allowed

on account of the net loss of the Haines Furniture Company for the period January 1, 1925, to May 31, 1925, in computing the consolidated net income of both corporations for the periods June 1, 1925, to December 31, 1925, or for the calendar year 1926. The deduction was claimed, however, against the 1927 income of Haines Furniture Company in the consolidated corporation income tax return for the calendar year 1927.

20 The Commissioner of Internal Revenue disallowed the deduction of $59,239.56 (being the net loss of Haines Furniture Company for the period January 1, 1925, to May 31, 1925), or any part thereof, in computing the net income of Haines Furniture Company, and in computing the consolidated net income of the two corporations for the calendar year 1927, solely upon the ground that the net loss of Haines Furniture Company for the period January 1, 1925, to May 31, 1925, may not be carried forward, under section 206 (b) of the Revenue Act of 1926, beyond the end of the taxable year 1926. The Commissioner's contention rested upon the ground that the period from January 1, 1925, to May 31, 1925, constituted one taxable year of the Haines Furniture Company; that the period from June 1, 1925, to December 31, 1925, constituted the "second year" as such phrase is used in such section; that the calendar year 1926 constituted the "third year" as such phrase is used in said section; and that such deduction may not be taken beyond the end of the "third year."

This action of the Commissioner resulted in a deficiency against the petitioner in income tax for the calendar year 1927. The deficiency agains the petitioner for that year represented the allocation to it of the deficiency claimed to be due on the basis of the net income properly assignable to each of the affiliated corporations—namely the petitioner and Haines Furniture Company—as provided in section 240 of the Revenue Act of 1926. This deficiency resulted solely from the disallowance of the deduction by the Haines Furniture Company from its income for the calendar year 1927 of its net loss of $59,239.56 sustained by it during the period January 1, 1925, to May 31, 1925.

The only question is whether the period from January 1, 1925, to December 31, 1925, consists of one or two "taxable years" of the Haines Furniture Company. If it consists of one "taxable year", the net loss for the period January 1, 1925, to May 31, 1925, is deductible and the Commissioner is wrong and there is no deficiency: if it consists of two "taxable years" the net loss is not deductible and the Commissioner is right and the deficiency determined by him is proper.

21 Under date of October 25, 1929 the Commissioner of Internal Revenue sent a notice to the petitioner asserting a deficiency in the income tax due from the petitioner for the calendar year 1927 in the amount of $1,434.22.

Under date of December 16, 1929, the petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the income tax deficiency above mentioned.

After the answer of the Commissioner was duly filed and the pleadings properly completed, the case was submitted to the United States Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact. This case was consolidated for hearing with the case of Haines Furniture Company, petitioner, Board of Tax Appeals, docket no. 46640, and a memorandum opinion of the Board of Tax Appeals was entered November 5, 1932. A decision of the Board determining that there is a deficiency of $1,434.22 in income tax due from the petitioner for the year 1927 was entered on November 7, 1932.

The memorandum opinion of the Board was revised to correct an error on January 4, 1933, but the decision was not altered.

III. Morgan's, Incorporated, the petitioner, being aggrieved by the findings of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit.

IV. The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the period from January 1, 1925, to May 31, 1925, constituted one taxable year and the period June 1, 1925, to December 31, 1925, another taxable year of the Haines Furniture Company within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

2. The Board of Tax Appeals erred in not holding that the period January 1, 1925, to December 31, 1925, constituted one taxable year of the Haines Furniture Company within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

3. The Board of Tax Appeals erred in holding that the
22 net loss of the Haines Furniture Company, amounting to $59,239.56 for the period January 1, 1925, to May 31, 1925, is not deductible from the net income of the Haines Furniture Company, amounting to $63,188.34, in computing the consolidated net income of the petitioner and Haines Furniture Company for the calendar year 1927, and erred in not holding that the Haines Furniture Company is entitled to carry forward and deduct the same from its net income for the calendar year 1927 in computing the consolidated net income of the petitioner and Haines Furniture Company for the calendar year 1927.

4. The Board of Tax Appeals erred in finding a deficiency of $1,434.22 in income tax of the petitioner for the calendar year 1927 and in not finding that there is no deficiency due from the petitioner for such year.

Wherefore, Morgan's, Incorporated, petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law, and with the rules of said court, and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

LAWRENCE E. GREEN,
Attorney for the Petitioner,
60 State Street, Boston, Massachusetts.

[Duly sworn to by Lawrence E. Green; jurat omitted in printing.]

23 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket No. 46640

[Title omitted.]

Petition for review and assignments of error

Filed January 14, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Haines Furniture Company, the petitioner in this cause, by Lawrence E. Green, attorney, and hereby files its petition for a review by the United States Circuit Court of Appeals for the First Circuit of a decision by the United States Board of Tax Appeals rendered on November 7, 1932, determining a deficiency in the petitioner's Federal income tax for the calendar year 1927 in the amount of $6,563.12, and respectfully shows:

I. The petitioner is a Massachusetts corporation with its principal office in Boston, Massachusetts.

A consolidated corporation income tax return was filed by the petitioner and Morgan's, Incorporated, for the calendar year 1927 with the Collector of Internal Revenue for the District of Massachusetts, which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

The court in which the review of these proceedings is sought is the United States Circuit Court of Appeals for the First Circuit.

II. The nature of the controversy is as follows:

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1927.

24 Prior to 1925 the petitioner and Morgan's, Incorporated, were separate Massachusetts corporations. They each at all

material times maintained their books and filed income-tax returns on the calendar year basis. On June 1, 1925, Morgan's, Incorporated, acquired the entire voting stock of the petitioner.

For the year 1925 the petitioner, in accordance with the regulations of the Commissioner of Internal Revenue, filed a separate income-tax return for the period January 1, 1925, to May 31, 1925, which disclosed a net loss of $59,239.56, which had been sustained by the petitioner in that period. The petitioner had a net loss for the balance of the calendar year 1925 of $61,626.69, which was included (together with Morgan's, Incorporated's, net income of $203,527.24 for the calendar year 1925) in a consolidated corporation income-tax return which was filed by the petitioner and Morgan's, Incorporated, for the calendar year 1925.

For the calendar year 1926, a consolidated corporation income-tax return was filed in accordance with said regulations, which included Morgan's, Incorporated's, net income of $142,900.94 and the petitioner's net loss of $2,551.76 for that year.

For the calendar year 1927 Morgan's, Incorporated, had a net income of $182,932.12 and the petitioner a net income of $63,188.34. In accordance with said regulations a consolidated corporation income-tax return was filed by both of said corporations for the calendar year 1927. In that return as filed the net income of the petitioner, amounting to $63,188.34, was reduced by $59,239.56, the amount of the net loss sustained by the petitioner for the period from January 1, 1925, to May 31, 1925. The petitioner had had net losses for the period June 1, 1925, to December 31, 1925, and for the calendar year 1926; and consequently no deduction was claimed or allowed on account of the net loss of the petitioner for the period January 1, 1925, to May 31, 1925, in computing the consolidated net income of both corporations for the periods June 1, 1925, to December 31, 1925, or for the calendar year 1926. The deduction was claimed, however, against the 1927 income of the petitioner in the consolidated corporation income-tax return for the calendar year 1927.

25 The Commissioner of Internal Revenue disallowed the deduction of $59,239.56 (being the net loss of the petitioner for the period January 1, 1925, to May 31, 1925), or any part thereof, in computing the net income of the petitioner, and in computing the consolidated net income of the two corporations for the calendar year 1927, solely upon the ground that the net loss of the petitioner for the period January 1, 1925, to May 31, 1925, may not be carried forward, under section 206 (b) of the Revenue Act of 1926, beyond the end of the taxable year 1926. The Commissioner's contention rested upon the ground that the period from January 1, 1925, to May 31, 1925, constituted one taxable year of the petitioner; that the period from June 1, 1925, to December 31, 1925, constituted the "second year" as such phrase is used in such section; that the calendar year 1926 constituted the "third year" as such phrase is used

in said section; and that such deduction may not be taken beyond the end of the "third year."

This action of the Commissioner resulted in a deficiency against the petitioner in income tax for the calendar year 1927. The deficiency against the petitioner for that year represented the allocation to it of the deficiency claimed to be due on the basis of the net income properly assignable to each of the affiliated corporations—namely the petitioner and Morgan's, Incorporated—as provided in section 240 of the Revenue Act of 1926. This deficiency resulted solely from the disallowance of the deduction by the petitioner from its income for the calendar year 1927 of its net loss of $59,239.56 sustained by it during the period January 1, 1925, to May 31, 1925.

The only question is whether the period from January 1, 1925, to December 31, 1925, consists of one or two "taxable years" of the petitioner. If it consists of one taxable year, the net loss for the period January 1, 1925, to May 31, 1925, is deductible and the Commissioner is wrong and there is no deficiency; if it consists of two taxable years the net loss is not deductible and the Commissioner is right and the deficiency determined by him is proper.

Under date of October 25, 1929, the Commissioner of
26 Internal Revenue sent a notice to the petitioner asserting a deficiency in the income tax due from the petitioner for the calendar year 1927 in the amount of $6,563.12.

Under date of December 16, 1929, the petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the income-tax deficiency above mentioned.

After the answer of the Commissioner was duly filed and the pleadings properly completed, the case was submitted to the United States Board of Tax Appeals for decision on the basis of the pleadings and written stipulations of fact. This case was consolidated for hearing with the case of Morgan's, Incorporated, petitioner, Board of Tax Appeals, docket no. 46639, and a memorandum opinion of the Board of Tax Appeals was entered November 5, 1932. A decision of the Board determining that there is a deficiency of $6,563.12 in income tax due from the petitioner for the year 1927 was entered on November 7, 1932.

The memorandum opinion of the Board was revised to correct an error on January 4, 1933, but the decision was not altered.

III. Haines Furniture Company, the petitioner, being aggrieved by the findings of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit.

IV. The petitioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the period from January 1, 1925, to May 31, 1925, constituted one taxable year and the period June 1, 1925, to December 31, 1925, another taxable year of the petitioner within the meaning of the

Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

2. The Board of Tax Appeals erred in not holding that the period January 1, 1925, to December 31, 1925, constituted one taxable year of the petitioner within the meaning of the Revenue Act of 1926, and especially within the meaning of section 206 (b) thereof.

3. The Board of Tax Appeals erred in holding that the net
27 loss of the petitioner, amounting to $59,239.56, for the period January 1, 1925, to May 31, 1925, is not deductible from the 1927 net income of the petitioner, amounting to $63,188.34, in computing the consolidated net income of the petitioner and Morgan's, Incorporated, for the calendar year 1927, and erred in not holding that the petitioner is entitled to carry forward and deduct the same from its net income for the calendar year 1927 in computing the consolidated net income of the petitioner and Morgan's, Incorporated, for the calendar year 1927.

4. The Board of Tax Appeals erred in finding a deficiency of $6,536.12 in income tax of the petitioner for the calendar year 1927, and in not finding that there is no deficiency due from the petitioner for such year.

Wherefore, Haines Furniture Company petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law, and with the rules of said court, and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

LAWRENCE E. GREEN,
Attorney for the Petitioner,
60 State Street, Boston, Massachusetts.

[*Duly sworn to by Lawrence E. Green; jurat omitted in printing.*]

28 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE First Circuit

Board of Tax Appeals

Docket no. 46639

Stipulation for consolidation

Filed February 27, 1933

It is hereby stipulated and agreed by and between the parties to the above-entitled cause through their respective attorneys as follows:

That subject to the approval of the court the aforesaid cause may be consolidated on review with the cause of Haines Furniture

Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals, docket no. 46640; that one transcript of record for the combined causes may be printed and one brief on behalf of both petitioners and one brief on behalf of the Commissioner of Internal Revenue may be filed.

In witness whereof the parties to this cause indicated in the caption hereof by their respective attorneys of record have executed this stipulation this thirty first day of January 1933.

LAWRENCE E. GREEN,
Attorney for Morgan's Incorporated, Petitioner on Review.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent on Review.

29 In United States Circuit Court of Appeals for the First Circuit

Board of Tax Appeals

Docket No. 46640

Stipulation for consolidation

Filed February 13, 1933.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause through their respective attorneys as follows:

That subject to the approval of the court the aforesaid cause may be consolidated on review with the cause of Morgan's Incorporated, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals, docket no. 46639; that one transcript of record for the combined causes may be printed and one brief on behalf of both petitioners, one brief on behalf of the Commissioner of Internal Revenue may be filed.

In witness whereof the parties to this cause indicated in the caption hereof by their respective attorneys of record have executed this stipulation this thirty-first day of January 1933.

LAWRENCE E. GREEN,
Attorney for Haines Furniture Company, Petitioner on Review.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent on Review.

30 Before United States Board of Tax Appeals

Docket No. 46639

[Title omitted.]

Præcipe for the record

Filed March 3, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of the record the following documents or certified copies thereof:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) The pleadings before the Board of Tax Appeals as follows:

(a) Amended petition filed in January 1930 with exhibits attached.

(b) Answer to amended petition.

(3) Memorandum opinion.

(4) Decision.

(5) The order entered by the Board of Tax Appeals on January 4, 1933, correcting the memorandum opinion.

(6) The petition for review with assignments of error.

(7) Stipulation, February 27, 1933.

(8) This præcipe.

LAWRENCE E. GREEN,
Attorney for Petitioner.

Service of a copy of the within præcipe is hereby admitted this twenty-eighth day of February 1933.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

31 Before United States Board of Tax Appeals

Docket No. 46640

[Title omitted.]

Præcipe for the record

Filed March 3, 1933

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the

First Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of the record the following documents or certified copies thereof:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. The pleadings before the Board of Tax Appeals as follows:
(a) Amended petition filed in January 1930 with exhibits attached.
(b) Answer to amended petition.
3. Memorandum opinion.
4. Decision.
5. The order entered on January 4, 1933, correcting memorandum opinion.
6. The petition for review with assignments of error.
7. Stipulation filed February 13, 1933.
8. This præcipe.

LAWRENCE E. GREEN,
Attorney for Petitioner.

Service of a copy of the within præcipe is hereby admitted this twenty-eighth day of February 1933.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

[MEMORANDUM: Orders for consolidation and of enlargement of time for docketing case to, and including, April 6, 1933, are here omitted.—A. I. CHARRON, clerk.]

33 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October term, 1932

Re: Morgan's, Incorporated, v. Commissioner of Internal Revenue. B.T.A. No. 46639.
Haines Furniture Company v. Commissioner of Internal Revenue. B.T.A. No. 46640.

Order consolidating cases

March 3, 1933

Upon motion of petitioners, it is ordered that these cases be consolidated on appeal and be docketed as a single case in this court.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

In United States Circuit Court of Appeals

Minute entries

On August 1, 1933, motions for substitution of Guy T. Helvering, Commissioner of Internal Revenue, for David Burnet were filed and allowed.

On October 13, 1933, this consolidated cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable Ira L. Letts, District Judge, sitting.

35 In United States Circuit Court of Appeals for the First Circuit

No. 2807. October term, 1933

MORGAN'S, INCORPORATED, ET AL., PETITIONERS FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Board of Tax Appeals

Before WILSON, MORTON, and LETTS, JJ.

Opinion of the court

Filed December 15, 1933

WILSON, J. This is a petition for a review by taxpayers of an order of the Board of Tax Appeals relating to the income taxes of the affiliated petitioners for the year 1927.

Morgan's, Incorporated, hereinafter referred to as the Morgan Company, and the Haines Furniture Company, hereinafter referred to as the Haines Company, became affiliated on June 1, 1925. Both companies kept their books and made their returns on a calendar-year basis.

In 1925 the Haines Company filed a separate return for the fractional part of the year 1925, from January 1 to June 1, showing a net loss of $59,239.56. Its net loss for the balance of the calendar year 1925 was $61,626.69, which was absorbed in the consolidated return of both companies for the calendar year 1925. Its total net loss for the calendar year 1925, therefore, was $120,-866.25. In 1926 the Haines Company suffered a further net
36 loss of $2,551.76. In 1927 it showed a net income of $63,188.34, and in making the consolidated return for 1927, the loss suffered by the Haines Company during its unaffiliated period of 1925, viz: $59,239.56, was deducted from its net income in 1927.

The Commissioner refused to allow the deduction and assessed a deficiency against both companies and allocated to each its proportion of the deficiency on the basis of the net income assigned to each, as provided in sec. 240 of the 1926 Revenue Act.

The Board of Tax Appeals held that, as to the Haines Company, under sec. 200 of the 1924 and 1926 acts, the period from January 1, 1925, to May 31, 1925, constituted a taxable year and the period from May 31, 1925, to January 1, 1926, constituted a second taxable year, and therefore the calendar year 1927 was not a third taxable year in which, under sec. 206 (b), a net loss incurred in the unaffiliated part of 1925 could be deducted from its net income in 1927.

The issue as stated by both the taxpayers and the Government is whether the net loss sustained during the unaffiliated part of the year 1925 can, under sec. 204 (b) of the 1924 act, or 206 (b) of the 1926 act, be carried forward into the year 1927 and be deducted from its own net income for the calendar year 1927 in determining the net income of the affiliated companies for that year.

Stated in other words, the issue is whether the addition to sec. 200 in the 1924 and 1926 acts defining a taxable year as including "in case of a return for a fractional part of a year . . . the period for which such return is made," modifies the provisions of sec. 204 (b) of the 1924 act and 206 (b) of the 1926 act, permitting the deduction of net losses incurred in one taxable year to be carried over and deducted from the net income of the second succeeding year, if not entirely absorbed in the first succeeding year.

The language of sec. 200 of the 1924 and 1926 acts, it is true, if strictly construed, raises doubt as to its application to returns for fractional parts of years required to be made by a tax payer prior to affiliation, or after the end of affiliation, if affiliation
37 begins or ends during a fiscal or calendar year. It is, however, a well-settled principle of construction of the income tax law that in cases of doubt the construction should be resolved in favor of the taxpayer.

In the case of Commissioner v. Riley Stoker Corporation, recently decided by this court, it was held that under the 1921 Revenue Act the division of a taxable year into two parts in case of an affiliation occurring in the midst of a calendar or fiscal year, did not create two taxable years within the meaning of sec. 200 and 212 (b) of that act, or an additional taxable unit.

Notwithstanding sec. 200 of the act of 1924 and of 1926 still declares that the term "fiscal year" means an accounting period of twelve months, and, of course, a calendar year also includes a period of twelve months without legislative fiat, the Government relies on the addition in sec. 200 of the acts of the 1924 and 1926, which declares that the term "'taxable year' includes, in the case of a return for a fractional part of a year under this title or under

regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, the period for which such return is made."

Art. 634 of Treasury Regulations 65 and 69, applying respectively to the act of 1924 and 1926, provides:

"Where there are more than two corporations affiliated at the beginning of the taxable year, and due to a change in stock ownership the affiliated status of one or more is terminated, but there remain at least two corporations affiliated during the entire year, the parent or principal corporation should file a consolidated return for the entire year, excluding from its return the income of the corporations whose affiliated status is terminated from the date of the change in stock ownership; or where two or more corporations are affiliated at the beginning of the taxable year, and through change in stock ownership additional corporations become affiliated, the parent or principal corporation should file a consolidated return and include the income of such corporations from the date of change of stock ownership. In either case, the subsidiary or subordinate corporation whose status is changed during the taxable year
38 should make a separate return for that *part of the taxable year* during which it was outside of the affiliated group.

"Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations *for the portion of the taxable year* during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. For example, if two corporations become affiliated on July 1, 1926, and elect to file a consolidated return for the period from July 1 to December 31, 1926, the separate returns of the corporations covering the period from January 1 to June 30, 1926, will be due on March 15, 1927." (Italics supplied.)

It is significant that under this article the return for the unaffiliated part of the calendar year is not due until March 15 of the following year, thus adopting the construction contended for by the taxpayer in this case, that the return for the unaffiliated fractional part of a calendar year is only for a part of a taxable year. Otherwise, if such fractional part of a calendar year constituted an entire taxable year, the return for such fractional period, terminating before the end of the calendar year, would, under sec. 227 of the 1924 and 1926 acts, be due three months after the close of the fractional period and not on March 15 of the following year. Also see art. 441, regulations 69.

The proper construction of sec. 200 we think should be determined in view of the general scheme of the income-tax acts as to accounting periods, and the purpose of Congress in allowing net losses to be spread over a three-year period.

The provision allowing a spread of net loss in one year to be deducted from the net income of the two succeeding years, first appeared in the act of 1921, sec. 204 (b), though a provision was inserted in the 1918 act, sec. 204 (b), permitting net losses for any year beginning after October 31, 1918, and prior to January 1, 1920, to be deducted from the net income of the next prior year.

The purpose of both acts, it has been recognized by the
39 courts and by the Board of Tax Appeals, was to provide a relief for taxpayers who might suffer severe losses in the year immediately following the close of the war in 1918, to deduct their losses from the war profits of 1918, and to allow losses of any one year during the period of readjustment of business after the war to be spread over a period of three years, in case there was not income earned during either of the two succeeding years after the loss occurred. Sec. 200 of the 1924 and 1926 acts should be so construed as to allow the relief granted by sec. 204 (b) and 206 (b) of these acts, and not to curtail it.

The Supreme Court has construed the Income Tax Acts since 1913 as, in general, defining the accounting period as a period of twelve months. Burnet v. Sanford & Brooks Co., 282 U.S. 359, 363, in which the court said:

"All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt." Also see Woolford Realty Co., Inc., v. Rose, 286 U.S. 319, 326.

Why, then, did Congress add the further definition of a taxable year as including a shorter period and was it intended to affect the provisions of sec. 204 (b)?

The majority report of the Ways and Means Committee on the Revenue Act of 1924, H.R. 6715, when this added definition first appears, referring to sec. 200, says:

"In subdivision (a) of this section the term 'taxable year' is defined to include a period of less than a year when a return is made for such period. Under the existing law the use of the term 'taxable year' in the 'net loss' section and other sections has been construed not to cover the case of a return made by a taxpayer for a fractional part of a year, with the result that the benefits of such sections are denied to taxpayers who are required by law to make a return for a fractional part of a year."

Similar language was contained in the report of the Senate Committee on Finance.

40 The Commissioner of Internal Revenue had, prior to the enactment of the 1924 act, construed secs. 200 and 204 (b) of the 1921 act strictly, and held that a taxpayer beginning business or going out of business during a fiscal or calendar year, or in case of a change in the accounting period during a taxable year from a fiscal to

a calendar year, or vice versa, was not entitled to the relief provided in sec. 204 (b), and had refused to allow as a deduction in a succeeding year net losses incurred in any fractional part of a year for which the taxpayer was required to file a return, because a fractional part of a year was not a taxable year within the meaning of secs. 200 and 204 (b) of that act. Appeal of Carroll Chain Co., 1 B.T.A. 38; Appeal of Patapsco Ballast Co., 1 B.T.A. 1081; Appeal of Joe Siegel, Inc., 1 B.T.A. 1113; Appeal of Tacoma Grocery Co., 1 B.T.A. 1062, in which cases there were appeals from his decisions.

It is clear, we think, that Congress, as was indicated in the report of its committees, added the further definition of a taxable year to sec. 200 in order that a taxpayer required to make a return for a fractional part of a year, which by reason of a change in its accounting period was not a part, either of its prior or new annual accounting period, should clearly have the benefit of sec. 204 (b) as to losses suffered during that fractional period, a right which the Commissioner in his construction of sec. 200 of the 1921 act had previously denied him.

The added definition of a taxable year was in furtherance of the relief granted in sec. 204 (b) of the 1921 act, and was not intended as a curtailment thereof by shortening the period over which net losses might be spread, and to repudiate the strict construction of sec. 200 and 204 (b) previously enforced by the Commissioner.

Sec. 200 of the 1924 and 1926 acts, therefore, thould not be construed, as has been done in this case, to deprive a corporation, which has hitherto been doing business and making its return on a calendar year, and which suffered a loss during the calendar year 1925, of the right to spread that loss over the two succeeding years, because, in accordance with Treasury Regulations 69, art. 634,
41 it made a separate return of its income during the period from January 1 to May 31, 1925, having on May 31 become affiliated with another corporation and joined in a consolidated return for the period from June 1 to December 31, 1925, in which return only its loss suffered during the latter period was absorbed.

Affiliated taxpayers do not become a single taxable unit, but merely a single tax-computing unit. Woolford Realty Co. Inc. v. Rose, supra; Commissioner v. Ginsberg, 54 Fed. (2d) 238; United States v. Hoffman et al., 61 Fed. (2d) 294; Sweets Company of America, Inc. v. Commissioner, 40 Fed. (2d) 436. The Haines Company, therefore, retained its status as a separate "taxable unit" for the entire calendar year 1925. Its net losses and net income were determined by its business for the full calendar year. After affiliation its proportionate net loss absorbed in the affiliated return was, or should have been, determined in accordance with art. 634 of the regulations 65, and sec. 240 of the 1924 act.

A liberal construction of sec. 200 as amended in 1924 requires that so much of the net losses of the Haines Company during 1925 as were not absorbed in the consolidated return, should be deducted from its net income in 1927, under sec. 204 (b) of the 1924 act, and

sec. 206 (b) of the 1926 act. The fact that it became a part of another tax-computing unit on June 1, 1925, did not change its status as a taxable unit for that year. It was still a "taxable unit" for the full calendar year of 1925, which constituted its taxable year. Beneficial Loan Soc. of Bethlehem v. United States, 48 Fed. (2d) 686. (Certiorari denied 284 U.S. 633.) For an able discussion of the proper construction of sec. 200, also see the dissenting opinion of Member Van Fossan in the case of Weissberger Moving & Storage Company, Inc. v. Commissioner, 26 B.T.A. 1375, 1377.

The only case which has been called to our attention in which the court has expressed any opinion touching the issue here involved, is that of the Beneficial Loan Soc. of Bethlehem v. United States, supra, decided in the court of Claims, in which there was a
42 cessation of affiliation on May 1, 1925. A consolidated return for the period from January 1, 1925, to May 1, 1925, was filed.

The plaintiff then filed a separate return for the unaffiliated period from May 1, 1925, to January 1, 1926, its accounting period being a calendar year, and claimed only $1,500 as its prorated share under sec. 226 of the credit of $2,000 allowed corporations in its class. Afterward it claimed it should have been entitled to deduct the full credit of $2,000, which would have reduced its tax in the amount of $65.25, which it sought to recover in the action.

The court in deciding the case said:

"The plaintiff contends the return made by it from May 1, 1925, to January 31, 1926, was its first return and therefore was a 'taxable year,' and, being such, it is entitled to the full amount of the credit. But this contention is not true. The plaintiff was in existence for its entire fiscal year of twelve months, ending January 31, 1926, and previous thereto. Until May 1, 1925, plaintiff was affiliated with another corporation and the consolidated return was the return of the plaintiff until the affiliation ceased, and this is true whether the consolidated return was filed by or in the name of another corporation as the parent company. It was the return of the plaintiff as much as if it had been a separate return. Each member of the affiliated group at all times retained its separate identity and was a separate taxpayer under the statute.

* * * * * * *

"On the last date the affiliation, so far as the plaintiff was concerned, was terminated by a change in the stock ownership and the plaintiff was no longer required or permitted to include its income in an affiliated return. Under section 226 (b) of the Revenue Act of 1926, in article 634 of regs. 65 and 69, plaintiff was required to make and file a separate return for the period May 1, 1925, the date of the termination of the affiliation, to the end of its taxable year, January 31, 1926.

* * * * * * *

"The separate return filed by the plaintiff for the period of May 1, 1925, to January 31, 1926, was not a return for a 'taxable year' any more than was the consolidated return for three months of the plaintiff's fiscal year a return by it for a taxable year. Under the facts there was merely a change in the basis of reporting net income which required the plaintiff to file a return for a fractional part of a year."

It is true that the spreading of net losses was not involved in the case, but we think the court by a parity of reasoning would, upon the same facts as exist in the case now at bar, deduct the loss suffered by the Haines Company in the period from January 1 to June 1, 1925, from its net income in 1927.

The order of the Board of Tax Appeals is set aside and the case is remanded to that Board for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Final decree

December 15, 1933

This consolidated cause came on to be heard upon the record upon petitions for review of the United States Board of Tax Appeals, and was argued by counsel:

Upon consideration whereof, it is now, to wit, December 15, 1933, here ordered, adjudged, and decreed as follows: The order of the Board of Tax Appeals is vacated and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on January 15, 1934, mandate issued to the Board of Tax Appeals.

[Clerk's Certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Order extending time within which to apply for a writ of certiorari

Filed Feb. 26, 1934

On consideration of the motion of counsel for the petitioner in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same hereby is, extended for a period of sixty days from March 15, 1934.

Dated this 24th day of February 1934.

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court of the United States.

49 Supreme Court of the United States

Order allowing certiorari. Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 38507. U.S. Circuit Court of Appeals, First Circuit. Term No. 12. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Morgan's, Incorporated, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 29, 1934. File No. 904 O.T. 1933.